

SCEC-18-0000909

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IN THE SUPREME COURT OF THE STATE OF HAWAII

THOMAS WATERS, a/k/a TOMMY
WATERS,

Petitioner,

vs.

SCOTT NAGO, Chief Elections Officer;
STATE OF HAWAII OFFICE OF
ELECTIONS; and GLEN TAKAHASHI,
in his official capacity as the City Clerk of
the City & County of Honolulu,

Respondents.

ORIGINAL PROCEEDINGS

**INTERVENOR-RESPONDENT TREVOR R. OZAWA'S RESPONSE TO SUPREME
COURT ORDER DATED DECEMBER 28, 2018**

DECLARATION OF TREVOR OZAWA

CERTIFICATE OF SERVICE

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**INTERVENOR-RESPONDENT TREVOR R. OZAWA'S RESPONSE TO SUPREME
COURT ORDER DATED DECEMBER 28, 2018**

Intervenor-Respondent Trevor R. Ozawa ("Mr. Ozawa"), by and through his attorneys, Cox Fricke LLP, hereby responds to the December 28, 2018 Order of the Supreme Court of the State of Hawai'i, requesting that Respondents Scott Nago, Chief Election Officer ("Chief Election Officer"), State of Hawai'i Office Of Elections (collectively "Office of Elections"), Glen Takahashi, in his official capacity as the City Clerk of the City & County of Honolulu ("City Clerk"), and Mr. Ozawa (collectively "Respondents") provide the following information to Petitioner Thomas Waters, a/k/a Tommy Watters ("Petitioner") and the court within three days of the order:

1. Information setting forth the margin of error for the electronic vote counting machines, when applying the tabulation procedures established by or in accordance to chapter 3-172 of the Hawaii Administrative Rules [{"HAR"}], that were used in the November 6, 2018 general election.

2. Information setting forth how the intent of the voter is ensured in a close election without a hand count, such as when a ballot contains marginal marks.

Mr. Ozawa's primary concern in this matter is that the constituents of District IV have a Councilmember to represent them on January 2, 2019 who was duly elected pursuant to the procedures set forth by the legislature in Hawai'i Revised Statutes ("HRS") Chapters 11, 15, 15D and 16 and the Office of Elections pursuant to HAR Title 3 Subtitle 13. All of the evidence submitted in this matter by the Respondents – which has not been opposed by Petitioner – establishes that the Office of Elections and the City Clerk complied with all laws and regulations related to full and fair elections.¹ Petitioner has made no allegations to the contrary and has failed to meet his statutory burden of proof to demonstrate "errors, mistakes or irregularities," *Akaka v. Yoshina*, 84 Hawai'i 383, 387, 935 P.2d 98, 102 (1997), or any other basis for invalidating the election, such as "**provable** fraud, overages, or underages, that could cause a difference in the election results" as mandated by HRS § 11-172 (emphasis added).

Additionally, of grave concern to Mr. Ozawa is that, to the extent this matter remains unresolved by noon of January 2, 2019 and the Election is uncertified pursuant to HRS § 11-156, Mr. Ozawa's staff members will be without employment. (Declaration of Trevor Ozawa dated December 31, 2018 ("Ozawa Decl.") at ¶¶ 4-5.) This loss of employment for Mr. Ozawa's staff would have serious consequences for them, including but not limited to, issues related to their City and County benefits, such as health insurance and break in service and resulting loss of benefits. (*Id.*) Moreover, Mr. Ozawa's staff members might have to seek

¹ It is well-settled that Petitioner's failure to oppose the Office of Elections' December 6, 2018 Motion to Dismiss Complaint Filed on November 26, 2018, or in the Alternative, Motion for Summary Judgment is an abandonment of his case. *See, e.g., Richardson v. Lane*, 6 Haw. App. 614, 736 P.2d 63, *cert. denied*, 484 U.S. 953 (1987), *reh'g denied*, 484 U.S. 1037 (1988).

alternative employment, making it difficult for Mr. Ozawa to hire/retain staff, hold necessary meetings, and otherwise prepare for his position as Councilmember of District IV.² (*Id.*)

Petitioner's primary argument set forth in his Complaint filed herein on November 26, 2018 (the "Complaint") is that the Office of Elections and the City Clerk **should not** have counted 1,286 absentee ballots after the polls closed on Election Day. Consistent with basic principles of democracy, the Office of Elections and City Clerk provided detailed information to Petitioner and this Court related to the propriety of counting the absentee ballots and that the ballots were appropriately counted in accordance with the procedures required by law.

The secondary argument raised by Petitioner in his Complaint, despite the fact that such argument was previously rejected by this Court under substantially similar circumstances in *Waters v. Nago* ("*Waters I*"), No. SCEC-14-0001317, 2014 WL 7334915, at *1 (Haw. Dec. 24, 2014), is that "the reported margin of 22 votes (0.00055 of 1%) is within the margin of error of the counting machines used in the election and the failure to verify the accuracy of the count," standing alone, constituted an "error, mistake or irregularity." (Complaint at ¶ 40.) Petitioner's Complaint does not include any specific reference to either the HRS or the HAR related to a "margin of error." Indeed, as established by the Office of Elections, there is no "margin of error." As explained below, the Office of Elections provided

² On December 27, 2018, the Honolulu City Council filed Honolulu City Council Resolution No. 18-294 naming Mr. Ozawa as Chair of the City Council. Although Mr. Ozawa's election remains uncertified, the Revised Charter of Honolulu Section 3-107 mandates that the first Council meeting occur on January 2, 2019 and that officers of the Council be elected at that January 2, 2019 meeting. Additionally, HRS § 92-7 requires that the City Council provide written notice, including an "agenda of all items to be considered at the meeting," HRS § 92-7(a), at least six calendar days prior to the meeting, HRS § 92-7(b). Thus, the City Council had to file Honolulu City Council Resolution No. [18-294](#) on December 27, 2018 to give lawful notice.

clear and uncontroverted evidence that it followed the laws and regulations for the use of the Hart InterCivic's Ballot Now in the Election. Accordingly, the election of Mr. Ozawa should be certified because he received more votes in the Election.

I. All of the Evidence Establishes that the Election Was Full and Fair Under HRS Chapters 11, 15, 15D and 16 and HAR Title 3 Subtitle 13 and that There Is No Applicable "Margin of Error"

The Chief Election Officer is established by Article IV, Section III of the Constitution of the State of Hawai'i, which states that "[t]he legislature shall provide for a chief election officer of the State, whose responsibilities shall be as provided by law and shall include the supervision of state elections, the maximization of registration of eligible voters throughout the State and the maintenance of data concerning registered voters, elections, apportionment and districting." Pursuant to Article IV, Section III, the legislature established the duties of the Chief Election Officer, who is provided with broad authority to supervise "all state elections." HRS § 11-2. *Gillan v. Gov't Employees Ins. Co.*, 119 Hawai'i 109, 114, 194 P.3d 1071, 1076 (2008) ("an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous").

Importantly, the Chief Election Officer has broad authority in adopting and using an electronic voting system. HRS § 16-1. Consistent with this authority, HRS § 16-42 specifically provides that:

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system.

In turn, HAR §3-176-1 governs “voting system requirements” and provides that the Chief Election Officer is authorized to use a voting system that complies with certain federal standards. There are regulations governing testing of computer programs, HAR §3-176-6, and manual audits, HAR §3-172-102, to “verify the results of the election.” There are **no** statutes or regulations related to a purported “margin of error.”

For this matter, the Chief Election Officer provided uncontroverted evidence that:

On the night of the general election, the manual audit team, pursuant to HAR § 3- 172-102(a), audited the computer generated results related to ballots voted at the polls, so as to ensure the accuracy and integrity of the voting and vote counting system. The audit is a hand count of the voted ballots which involved reviewing the physical ballots from the polling places associated with the selected district/precincts and confirming the manual audit results for a selected contest on the ballot matched the computer generated results for the selected contest. Pursuant to HAR § 3-172-102(b), if discrepancies are found in the audit, the chief election officer may authorize an expanded audit to determine the extent of misreporting within the system. The manual audit team did not request an expanded audit and I similarly saw no basis to question the accuracy and integrity of the voting and vote counting system.

(Declaration of Scott Nago dated December 6, 2018 (“Nago Decl.”) at ¶ 21.)

In sum, the above referenced statutes and regulations express the legislative and administrative intent for the required and necessary safeguards for electronic voting. There is no statutory provision for an automatic recount of the ballots (regardless of the “margin of error”) as requested by Petitioner.³ Requiring a recount whenever the vote spread is less than a hypothetical margin of error is tantamount to requiring an automatic recount, which would be contrary to Hawai‘i law. Indeed, as aptly explained by the Chief Election Officer:

Going into this election, as previously stated, the State of Hawaii adopted a voting and vote counting system and with that a fixed objective standard as to how ballots would be counted based on a properly functioning voting and vote counting system that would be subject to inspection, audit, and testing by qualified observers before and after an election.

As we cannot change the rules after an election, any audit of results is focused on confirming how a properly functioning voting and vote counting system would count ballots. Given this, Petitioner would need to provide objective evidence that the system was not operating properly, in order to require additional auditing to occur.

(Nago Decl. at ¶ 40-41.)

Pursuant to HRS §§ 11-172 and 11-174.5, Petitioner must demonstrate errors, mistakes, or irregularities that would change the outcome of the election. He has failed to do so. The evidence establishes that the necessary and required legal safeguards and procedures

³ Unlike the Hawai‘i legislative and administrative structure related to voting procedures (and electronic voting in particular), the other states that have ordered recounts have relied specifically on statutes requiring recounts in statistically close elections. *See, e.g., Democratic Senatorial Campaign Comm. v. Detzner*, 2018 WL 6011226, at *1 (N.D. Fla. Nov. 15, 2018) (citing § 102.166, Fla. Stat. for the statutory requirement that a candidate for any office was defeated by 0.25% or less of the votes, a manual recount of overvotes and undervotes shall be ordered). As set forth in Mr. Ozawa’s December 17, 2018 Answer to Complaint Filed on November 26, 2018, the Hawai‘i legislature has not adopted a statute requiring automatic recounts (manual or otherwise) in elections.

were followed by the Office of Elections and the City Clerk. Thus, Mr. Ozawa respectfully requests that the Election be certified prior to January 2, 2019 at 12:00 p.m.

II. All of the Evidence Establishes that Intent of the Voter/Marginal Marks Were Appropriately Considered Pursuant to HRS Chapters 11 and 16 and HAR Title 3 Subtitle 13

As explained by the Office of Elections:

Hart InterCivic's Ballot Now uses commercial full-sheet scanning technology to record a full digital image of the voted ballot. Typical resolution of the full-sheet scan is 200 dots per inch (dpi) which provides a high-quality digital image of the voted ballot that is saved on the Ballot Now system and is used for all subsequent election activities.

After the scanner converts the paper ballot to an electronic image, Ballot Now analyzes marks at a resolution of 200 dots per inch (dpi). The software counts the number of pixels inside each option box in the digital image.

(Declaration of Rich Geppert at ¶ 6-7.)

Based on the quality of such technology, "count[ing] the number of pixels inside each option box," the Hart InterCivic's Ballot Now can recognize the acceptable "marginal marks" pursuant to §3-172-83(f)(2), which require marking inside of the "voting position" or "option box." As explained by the Office of Elections, "the law is clear that 'ballots that were marked for use by a marksense ballot voting system will be counted in accordance with those rules associated with that system to the extent reasonably possible.'" (Nago Decl. at ¶ 39) (quoting HAR § 3-172-102(c)(2)(A)). Indeed, "[t]he law is clear that one cannot change the rules after an election, in order to see if those new rules will allow someone to win." (*Id.*) Moreover, even if there was evidence that a voting machine was not operating properly, "the solution is not to move to a hand count, but instead to use voting machines that experienced no such problems." (*Id.* at ¶ 42) (citing HAR § 3-172-102(c)(1)(A)).

III. CONCLUSION

Based upon the foregoing, Mr. Ozawa respectfully requests that Petitioner's Complaint be dismissed and the Election be certified by January 2, 2019 before 12:00 p.m.

DATED: Honolulu, Hawai'i, December 31, 2018.

/s/ Joachim P. Cox

JOACHIM P. COX

ROBERT K. FRICKE

ABIGAIL M. HOLDEN

Attorneys for Intervenor-Respondent

TREVOR OZAWA

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DECLARATION OF TREVOR R. OZAWA

I, TREVOR R. OZAWA, hereby declare:

1. I am the Intervenor-Respondent in this matter.

2. I am authorized and competent to testify to the matters set forth herein,
and, unless otherwise indicated, I make this declaration based upon personal knowledge.

3. As a result of the November 6, 2018 general election, I am the current
Councilmember and uncertified Councilmember-Elect for the District IV (Waikiki-East
Honolulu), City and County of Honolulu ("District IV") seat, which new term is scheduled to
begin on January 2, 2019 at noon.

4. It is my understanding that, to the extent this matter remains unresolved by
noon of January 2, 2019 and the Election is uncertified pursuant to Hawai'i Revised Statutes
("HRS") § 11-156, my staff members will be without employment.

5. This is of grave concern to me because loss of employment for my staff would have serious consequences for them, including but not limited to, issues related to their City and County benefits, such as health insurance and break in service and resulting loss of benefits. Moreover, my staff members might have to seek alternative employment, making it difficult to hire/retain staff, hold necessary meetings, and otherwise prepare for the position as Councilmember of District IV.

I declare under penalty of perjury under the laws of the State of Hawai'i and the United States that the foregoing is true and correct.

Executed this 31st day of December, 2018, at Honolulu, Hawai'i.



TREVOR R. OZAWA

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served upon the following individuals via the means and on the date indicated below:

NAME(S)	U.S. MAIL POSTAGE PREPAID	HAND DELIVERY	JEFS
THOMAS WATERS, a/k/a TOMMY WATERS Petitioner			<input checked="" type="checkbox"/>
RUSSELL A. SUZUKI Attorney General, State of Hawai'i PATRICIA T. OHARA VALRI L. KUNIMOTO AARON H. SCHULANER Attorneys for Respondents SCOTT NAGO and STATE OF HAWAII OFFICE OF ELECTIONS			<input checked="" type="checkbox"/>

DONNA Y.L. LEONG Corporation Counsel, City and County of Honolulu DUANE W.H. PANG Attorneys for Respondent GLEN TAKAHASHI			<input checked="" type="checkbox"/>
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DATED: Honolulu, Hawai‘i, December 31, 2018.

/s/ Joachim P. Cox

JOACHIM P. COX

ROBERT K. FRICKE

ABIGAIL M. HOLDEN

Attorneys for Intervenor-Respondent

TEVOR OZAWA